

Tip of the Month



Selecting And Working With An E-Discovery Vendor

Scenario

A multinational construction company receives a wide ranging subpoena from the US Department of Justice demanding the production of a variety of documents maintained at various locations inside and outside the United States. That same day, the company's US affiliate receives a complaint filed in state court seeking damages for a relatively minor injury that occurred on one of the company's construction sites in Texas. The company intends to select an electronic discovery vendor to assist with the discovery process in both matters.

Considerations When Choosing an Electronic Discovery Vendor

The range of choices of electronic discovery vendors keeps increasing: with both a proliferation of small niche vendors on one hand and a significant expansion of services by a handful of soup-to-nuts vendors on the other. Many smaller vendors focus on one part of the process, such as converting paper records using optical character recognition (OCR) and coding, while other large vendors have invested heavily in infrastructure to provide capacity, reliability, fault tolerance and geographic availability. Some vendors now offer "cutting edge" technologies intended to streamline the process, such as predictive coding for document reviews. Choosing the right vendor can be essential to a successful discovery outcome.

For smaller, localized cases, a specialized vendor may be appropriate. For complex matters, where discovery may help determine criminal penalties or fines, a larger, integrated provider may be more appropriate.

The following issues should be considered when deciding what type (or types) of electronic discovery vendor to retain:

- **Existing state of the company's information management system.** If a company already has an effective document management system, and the scope of the discovery is small and well-defined, the need for expert help from a large, integrated vendor may not be required. Conversely, if organizing, collecting, reviewing and producing responsive files may be complicated by a less-than-fully integrated document management system, wide geographic distribution of salient records, or potentially broad scope, a small, localized vendor may not provide sufficient coverage or services to meet all of the company's discovery needs.
- **Time.** If the company must quickly produce all relevant files, then a larger, more sophisticated vendor may be the prudent choice.
- **Chain of custody.** As with physical evidence in a civil or criminal case, it often can be critical to establish and maintain a clear, unbroken chain of custody for each file from every

custodian. Such chains of custody can be easier to maintain and prove with a single integrated vendor than with several vendors each retained to perform discrete tasks. In any case, no matter what type of vendor is selected, counsel should supervise the process to help ensure the appropriate chain of custody is maintained.

- **Proportionality** The importance of the matter is a critical factor. The potential for criminal penalties or sanctions may prove a determining factor in deciding in favor of a particular type of vendor and the costs expended on discovery.
- **Cost.** An electronic discovery vendor's fees and fee structure varies based on the size of the task, the complexity of the processing and the speed in which completion is needed, among other factors. A major customer of a large electronic discovery vendor may be able to negotiate a mutually agreeable fee structure that reflects economies of scale. However, not all litigation needs a full-service electronic discovery vendor, and, in some cases, it may be more cost effective to choose a local, niche vendor.

Irrespective of which vendor is selected, when working with an electronic discovery vendor, counsel should keep the following issues in mind:

- **Preservation and Collection.** If the decision is made to copy data as a means of preservation, counsel and the vendor should work together with the goal of ensuring that the data cannot be altered, deleted or destroyed, and that a copy is created and maintained in a forensically sound manner. Counsel also should work with the vendor to identify and collect potentially responsive sources of data in a forensically sound manner. Counsel should be aware of and work with the vendor to ensure data privacy laws, to the extent implicated, are appropriately addressed.
- **Data Culling.** Effective data culling can dramatically reduce the volume of data that needs to be processed, thus potentially reducing production and review costs. Counsel and the vendor should work together to ensure data is culled and de-duplicated, but that all nonduplicative potentially responsive sources collected are reviewed.
- **Processing.** Once files are collected and culled, they should be processed, searched for privilege, and sorted by type or topic, and, in some cases, separated into smaller units for review. It has been estimated that approximately 80 percent of the time, and 80 percent of the cost, devoted to electronic discovery is spent in processing, review and analysis; therefore, having powerful workflow tools to manage this part can be critical to managing scarce resources.
- **Review.** A number of vendors provide software designed to simplify the review and analysis of data. Careful consideration should be given to finding the tools best suited to counsel's needs, which may differ from case to case.
- **Production.** Generally, the goal at the production phase is to be able to deliver data in a useable format to other parties, to a court or to a regulatory agency. Vendors often work with various litigation support applications, and counsel and the vendor should work together to ensure that appropriate production formats are used (e.g., load files or "native" production formats). Counsel and the vendor also should discuss potentially unforeseen consequences associated with the chosen production format(s), such as the potential effects on metadata or any changes to document integrity.

Conclusion

There is no one 'right' answer when choosing an electronic discovery vendor. Consider working with vendors of different sizes and service offerings to provide the right solution for the specific litigation or investigation.

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